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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re BERNARD JACKSON, on Habeas Corpus.	B215155 (Los Angeles County Super. Ct. No. BH005388)

APPEAL from an order of the Superior Court of Los Angeles County. Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, Heather Bushman and Kathleen R. Frey, Deputy Attorneys General, for the People.

Marilee Marshall & Associates and Marilee Marshall for Petitioner Bernard Jackson.

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The People of the State of California appeal from the trial court's grant of a petition for writ of habeas corpus filed by petitioner Bernard Jackson (Jackson) which challenged the Board of Parole Hearings' (Board) decision denying him parole and deferring his next parole hearing for two years. The trial court ruled that the Board's decision was not supported by "some evidence" that Jackson was unsuitable for parole. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 626.) We likewise conclude that the Board's decision was unsupported and therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In July 1988, Jackson was sentenced to an indeterminate life term after a jury convicted him of kidnapping to commit robbery, second degree robbery and possession of a firearm by a felon. According to the probation officer's report, in May 1986 Jackson approached the victim who was inside of her vehicle in a commercial parking lot during the late afternoon. He asked the victim the time and displayed a handgun when she rolled down the window to answer him. He told the victim to move to the passenger seat, but she said she could not because of the gear shift and told him to go around to the passenger side and put away the gun. Jackson got in the car and the victim drove him approximately five miles. At that point, Jackson reproduced the gun, told the victim to get out of the car and drove the car away. Jackson was arrested when he attempted to sell the car much later in January 1988.

Prior to that offense, Jackson had been convicted of robbery in 1980, was arrested for but not charged with receiving stolen property in 1982 and was arrested for but not charged with grand theft of an automobile in 1985 and 1986. While incarcerated, Jackson had received only one disciplinary infraction for aggressive behavior in 1991, two disciplinary infractions for nonaggressive behavior and five counseling chronos for nonaggressive behavior.[1] The most recent counseling chrono occurred in 2006, when

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[1] "In prison argot, 'counseling chronos' document 'minor misconduct,' not discipline . . . ." (*In re Smith* (2003) 109 Cal.App.4th 489, 505.)

officers removed six pounds of tobacco from Jackson that he had intended to sell. In terms of positive chronologies, Jackson completed multiple self-help courses between 2005 and 2007. He maintained medium A custody—the lowest custody level one can have as a life term prisoner. Jackson had no gang affiliation nor any record of substance abuse. He had been working in an assignment as a plumber for the past nine years and had received a certificate as an apprentice plumber. He also received significant training as an electrician while incarcerated and had completed his associate of arts degree in electrical engineering.

A June 2002 mental health evaluation placed Jackson in a low to moderate category for risk of violence to the community. A subsequent April 2005 psychological evaluation concurred with that assessment, noting that Jackson's pattern involved primarily property crimes. The 2005 evaluation identified the most significant risk associated with release as Jackson's possible association with others involved in property crimes. On the other hand, Jackson's strengths included "a stable supportive family, work skills, education, and increased maturity since the time of his incarceration."

At the conclusion of Jackson's fifth subsequent parole consideration hearing on September 12, 2007, the Board found that Jackson was not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released. In reaching that decision, the Board expressly relied on the circumstances of the commitment offense and Jackson's previous record, institutional behavior and psychological report. The Board determined that Jackson was not suitable for parole and deferred the next parole hearing for two years.

In July 2008, Jackson petitioned for writ of habeas corpus in the trial court. In a February 26, 2009 order, the trial court granted the petition and directed the Board to vacate its decision denying parole and to conduct a new hearing in conformity with the order. The trial court concluded that the record did not contain "some evidence" to support the determination that Jackson currently posed an unreasonable risk of danger to society. More specifically, the trial court determined that the commitment offense did not demonstrate an exceptionally callous disregard for human suffering; though the

victim was likely frightened, Jackson did not physically harm her or act in a manner calculated intentionally to induce terror in her. It further determined that Jackson's 1980 robbery was not indicative of any current risk given his years of violence-free rehabilitation. The court found that Jackson's prior disciplines while incarcerated were not the type of serious disciplines that may serve as a valid basis for denying parole. Nor did the court find that the psychological evaluation provided any evidence that Jackson was currently dangerous.

Relying on *In re Reed* (2009) 171 Cal.App.4th 1071, a new decision in which the appellate court affirmed the denial of parole on the ground that the inmate had received a recent counseling chrono, the People sought reconsideration of the trial court's order. The trial court denied reconsideration, finding that *In re Reed* was neither controlling nor factually similar to the instant matter. This appeal followed.

DISCUSSION

The People contend that the trial court erred in granting Jackson's petition for writ of habeas corpus because there was some evidence in the record establishing that Jackson presented a risk to public safety. "When a superior court grants relief on a petition for habeas corpus without an evidentiary hearing, as happened here, the question presented on appeal is a question of law, which the appellate court reviews de novo. [Citation.] A reviewing court independently reviews the record if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence. [Citation.]" (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192.)

In reviewing the record, we apply the same standard as the trial court, meaning "the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law."

(*In re Rosenkrantz, supra,* 29 Cal.4th at p. 658; accord, *In re Barker* (2007) 151 Cal.App.4th 346, 366.) Moreover, "because the overarching consideration is public safety, the test in reviewing the Board's decision denying parole 'is not whether some evidence supports the *reasons* [the Board] cites for denying parole, but whether some evidence indicates a parolee's release *unreasonably endangers public safety*. [Citations.] Some evidence of the existence of a particular factor does not necessarily equate to some evidence the parolee's release unreasonably endangers public safety.' [Citation.]" (*In re Barker, supra,* at p. 366.)

Guided by these principles, we find no error, as the record did not contain some evidence showing that Jackson poses a current unreasonable risk of danger to society.

I. Governing Law.

The purpose of parole is to help inmates "reintegrate into society as constructive individuals as soon as they are able," without being confined for the full term of their sentence. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 477.) In California, Penal Code section 3041 creates in every inmate a cognizable liberty interest in parole, and that interest is protected by the procedural safeguards of the due process clause. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 ["petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation'"].)

Penal Code section 3041, subdivision (a) provides in pertinent part that the Board shall set a release date "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime." Subdivision (b), establishes a presumption that parole will be the rule, rather than the exception, providing that the Board "shall set a release date unless it determines that the gravity of the current convicted offense . . . is such that

consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed . . . ." (Pen. Code, § 3041, subd. (b).) As emphasized in *In re Lawrence, supra,* 44 Cal.4th at page 1204, "'[t]he governing statute provides that the Board *must* grant parole *unless* it determines that *public safety* requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction. [Citation.]'"

In determining suitability for parole, the Board must consider factors specified by regulation. (Cal. Code Regs., tit 15, § 2281.) Factors tending to establish unsuitability for parole include that the inmate: (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison or jail. (Cal. Code Regs., tit. 15, § 2281, subd. (c)(1)–(6).) Correspondingly, factors tending to show suitability for parole include that the inmate: (1) does not have a juvenile record of assaulting others or committing crimes with the potential of personal harm to victims; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress built up over a long period; (5) committed the crime as a result of Battered Woman Syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release, or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities suggesting an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2281, subd. (d)(1)–(9).)

These factors serve as general guidelines and the Board must consider all reliable, relevant information available to it when determining parole suitability. (Cal. Code Regs., tit. 15, § 2281, subd. (b).) The Board is authorized "to identify and weigh only the factors relevant to predicting 'whether the inmate will be able to live in society without committing additional antisocial acts.'" (*In re Lawrence, supra,* 44 Cal.4th at pp. 1205–1206.) The paramount consideration for the Board when determining parole suitability is

public safety, which requires an assessment of the inmate's current dangerousness. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence, supra,* at p. 1205; see also Cal. Code Regs., tit. 15, § 2281, subd. (a) ["Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison"].)

II. The Trial Court Properly Determined That the Record Lacked Some Evidence That Jackson Presented a Current Unreasonable Danger to Society.

In granting Jackson's petition for writ of habeas corpus, the trial court evaluated the evidence relating to the four factors on which the Board relied to deny parole—Jackson's commitment offense, his prior robbery conviction, his institutional behavior and his psychological report. In connection with each of those factors, the trial court determined the record failed to provide some evidence of unsuitability for parole. We agree.

With respect to the commitment offense, the Board determined that the offense was carried out in a callous and calculated manner, the motive for the crime was trivial relative to the offense and the earlier kidnapping failed to deter Jackson from committing the later offense of attempting to sell the car. (See Cal. Code Regs., tit. 15, § 2281, subd. (c)(1)(B), (D) & (E).) The trial court, in contrast, found "no evidence the offense demonstrated an exceptionally callous disregard for human suffering." As explained in *In re Scott* (2004) 119 Cal.App.4th 871, 891, "to demonstrate 'an exceptionally callous disregard for human suffering' [citation], the offense in question must have been committed in a more aggravated or violent manner than that ordinarily shown in the commission of [the offense]." By way of illustration, the *Scott* court cited *In re Van Houten* (2004) 116 Cal.App.4th 339, 351, where exceptional callousness was shown by the excessive number of stab wounds inflicted by different weapons on multiple victims and by one victim who was struggling for her life being made aware that her husband was suffering a similarly gruesome fate. Here, in contrast, Jackson did not inflict physical injury, physical pain or severe trauma on his victim. (See *In re Scott, supra,* at pp. 891–892.)

Though the trial court agreed "that there is some evidence that the offense was carried out in a dispassionate and calculated manner and that the motive was very trivial in relation to the offense," it concluded that those facts were not probative of whether Jackson continued to pose an unreasonable risk to public safety. Again, *In re Scott, supra*, 119 Cal.App.4th at page 893 is instructive: "The reference in Board regulations to motives that are 'very trivial in relationship to the offense' therefore requires comparisons; to fit the regulatory description, the motive must be materially less significant (or more 'trivial') than those which conventionally drive people to commit the offense in question, and therefore more indicative of a risk of danger to society if the prisoner is released than is ordinarily presented." Thus, the purpose of evaluating the trivial nature of the inmate's motive is to address the public safety implications of release and to determine whether "the circumstances of the inmate's crime or criminal history *continue* to reflect that the prisoner presents a risk to public safety. [Citation.]" (*In re Lawrence, supra*, 44 Cal.4th at p. 1228.) We agree with the trial court that "the Board's findings regarding the immutable facts of the commitment offense, absent a rational nexus between those facts and current dangerousness, do not provide some evidence of unsuitability. [Citation.]"

To deny parole, the Board next relied on Jackson's history of "prior criminal conduct consisting of one prior arrest and conviction for robbery" and reasoned the prior offense showed that Jackson had failed to profit from society's previous attempts to correct his criminalities. We cannot conclude that the circumstances of Jackson's single prior offense that occurred almost 30 years ago constituted some evidence of a "previous record of violence" within the meaning of the regulations. (See Cal. Code Regs., tit. 15, § 2281, subd. (c)(2).) As Jackson explained at his parole hearing, in 1980 he was in college and, because he needed money for car insurance, he agreed to help a Carl's Jr. manager and worker rob their own restaurant. He was unarmed and was arrested immediately after the robbery, just a few blocks from the restaurant. He indicated that he had never done anything like that before and that he recognized the lack of responsibility associated with his decision to participate in the crime.

The trial court concluded that this decades-old offense, which it recognized involved no actual violence or physical assault, was not indicative of any current risk. (See *In re Scott* (2005) 133 Cal.App.4th 573, 602–603 [prior convictions for misdemeanor reckless driving and vandalism, neither of which involved bodily injury, failed to constitute some evidence of a previous record of violence showing unsuitability for release].) It also recognized that several aspects of Jackson's prior record tended to show suitability for release, including that Jackson had no juvenile record, lacked a significant history of violent crime, exhibited a stable social history and strong family support, and developed marketable skills. (Cal. Code Regs., tit. 15, § 2281, subd. (d)(1), (2), (6) & (8).)

With respect to Jackson's institutional behavior, even though the Board expressly acknowledged that Jackson had a limited number of rule violations, it nonetheless cited his five counseling chronos and three disciplinary reports as supporting a finding of current dangerousness. According to the regulations, "serious misconduct" supports a finding of unsuitability. (Cal. Code Regs., tit. 15, § 2281, subd. (c)(6); see also Cal. Code Regs., tit. 15, § 3315 [describing serious misconduct warranting discipline].) The trial court properly concluded that Jackson's counseling chronos failed to show serious misconduct while incarcerated. (See *In re Smith*, *supra*, 109 Cal.App.4th at p. 501 [distinguishing counseling chronos and discipline, explaining that counseling chronos involve only minor misconduct and entail no discipline, only counseling]; see also Cal. Code Regs., tit. 15, § 3312 [describing minor misconduct to be documents on a CDC Form 128-A as distinguished from serious misconduct to be reported on a CDC Form 115].) Accordingly, the trial court reasoned that Jackson's institutional behavior demonstrated no current unreasonable risk of danger to society: "[T]he record indicates that the Petitioner's only serious discipline was received for fighting more than 17 years ago. Although this discipline was indicative of a continued risk of danger at the time, it does not continue to be predicative of dangerousness now, after so many years of violence-free rehabilitation. Further, the Board may not rely on the 128A [counseling

chronology] discipline, no matter how recent, as it is not considered a 'serious discipline' by the Board's own regulations."

The People assert that the circumstances here are akin to those in *In re Reed, supra,* 171 Cal.App.4th 1071, where the appellate court affirmed the Board's denial of parole which was based in large part on the inmate's recent receipt of a counseling chrono. There, however, during his 20 years of incarceration Reed had received 11 reports of serious misconduct and 19 counseling chronos. (*Id*. at p. 1077.) As a result, at a 2005 parole hearing, the Board directed Reed to "'remain disciplinary free, not even a 128.'" (*Id*. at p. 1084.) Before the 2006 parole hearing, Reed received a counseling chrono for leaving work early. At the hearing, the Board relied on that instance of minor misconduct to deny parole. (*Id.* at p. 1085.) In affirming the denial, the court reasoned that Reed's most recent misconduct, when considered in the context of his history of institutional misconduct, demonstrated that Reed posed a current risk to society if released: "First, the misconduct violated a specific directive from the Board, given only two months before. Second, it occurred close in time to the Board's decision in 2006 to deny parole; that is, the incident was not stale. Finally, it was not an isolated incident; instead, it was part of an extensive history of institutional misconduct, including 11 CDC 115's and 19 CDC 128-A's. In evaluating the significance of the April 2005 CDC 128-A as an indicator of his ability, postrelease, to obey the criminal law and the conditions of his parole, the Board appropriately considered this history of misbehavior." (*Id*. at p. 1085.)

Here, in contrast, Jackson's recent counseling chrono for possessing tobacco failed to suffice as some evidence tending to indicate that Jackson was unsuitable for release. First, Jackson's receipt of the counseling chrono did not violate any express direction from the Board. At Jackson's 2005 parole hearing, the Board recommended that Jackson remain disciplinary free; Jackson had complied with that recommendation at the time of the 2007 parole hearing. Unlike *In re Reed, supra,* 171 Cal.App.4th at pages 1085 to 1086, the Board neither recommended nor required that Jackson not receive any counseling chronos. Second, Jackson's last incident of serious misconduct was stale,

having occurred in 1994. Finally, Jackson's most recent counseling chrono was not part of a pattern of misconduct. Particularly relative to the extensive history of misconduct documented in *In re Reed, supra*, at page 1077, Jackson's record of misconduct was minimal. As the Board pointed out, prior to the tobacco incident, Jackson's last counseling chrono had occurred in 1997. Highlighting the different facts presented *In re Reed*, the court there summarized the basis for the determination that Reed continued to pose a threat to public safety: "The Board relied on petitioner's receipt of a CDC 128-A only because it violated a prior direction of the Board, and because . . . petitioner had an extensive history of institutional misconduct." (*In re Reed, supra*, at p. 1086.)

Finally, the Board commented that Jackson's April 2005 psychological report was not totally supportive of release. But as the trial court reasoned, the report's conclusion that Jackson presented a low to moderate risk of future violence was premised on historical factors that would not change over time. According to the report, the elevated portion of Jackson's low to moderate risk ranking was based on Jackson's "history of involvement in criminal activity at a young age and of prior supervision failure . . . ." As explained in *In re Roderick* (2007) 154 Cal.App.4th 242, 277, the Board "'can look at immutable events, such as the nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not currently suitable for parole even after the initial denial [citation], but the weight to be attributed to those immutable events should decrease over time as a predictor of future dangerousness as the years pass and the prisoner demonstrates favorable behavior [citation]. . . ." The psychological report outlined Jackson's favorable behavior while incarcerated, including that he had exhibited increased maturity, participated in several educational programs and advanced his vocational skills as an electrician and plumber. The report further noted that Jackson had no mental health or substance abuse issues, had a stable and supportive family and had made plans as to where he would live and seek work if released. We agree with the trial court that the report's low to moderate risk assessment failed to constitute some evidence of Jackson's current dangerousness, given the report's favorable assessment of his current mental state and educational and vocational progress. (See *In re Lawrence, supra*, 44

Cal.4th at p. 1227 [where an inmate's postconviction record shows that an inmate no longer presents a danger to public safety, reliance on "the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability"].)

In sum, the trial court properly determined that the Board's finding Jackson unsuitable for parole was not supported by some evidence in the record that he posed a current risk of danger to society.

DISPOSITION

The trial court's order granting Jackson's petition for writ of habeas corpus is affirmed. The Board is directed to vacate its decision and to conduct another parole hearing within 120 days of the issuance of the remittitur or final resolution in the California Supreme Court. At that hearing, the Board is directed to find Jackson suitable for parole unless new evidence of his conduct or a change in his mental state subsequent to his 2007 parole hearing supports a determination that he currently poses an unreasonable risk of danger to society if released on parole.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST